MoneyNews

Cato Holds Panel Asking 'Is Administrative Law Unlawful?'

By Robert Feinberg
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The Cato Institute held a Book Forum June 5 featuring Columbia University Law School Professor Philip Hamburger discussing his book Is Administrative Law Unlawful?, with commentary by Stephen Williams, senior circuit judge for the U.S. Court of Appeals for the District of Columbia Circuit.

The event was moderated by Roger Pilon, director of Cato's Center for Constitutional Studies. In his introduction, Pilon observed that recent cases involving the Environmental Protection Agency (EPA) and the Affordable Care Act are examples of the Executive Branch concentrating within itself the functions of making, adjudicating and enforcing laws.

Hamburger focused on constitutional history to question the argument that concentrating power in administrative agencies is a modern phenomenon that could not have been anticipated by the Constitution, whereas, in fact, the arbitrary exercise of prerogatives of the state goes back at least several centuries. He compared the current conduct of administrative law with off-road driving — taking a vehicle designed for one purpose and employing it in another setting.

According to Hamburger, there are two interpretations that might apply to the modern view of administrative law. The "sunny" view is that this practice has grown up since the Interstate Commerce Commission (ICC) was created in 1887 as a necessary, pragmatic adaptation to the complexities of modern life. The "darker" view is that administrative agencies have embarked on a dangerous course that could result in their exercise of absolute power, contrary to the spirit of the Constitution as providing for limitations and checks and balances upon government agencies.

In order to prevent administrative power from becoming absolute, Hamburger advocated greater attention to actions of the Obama administration he considers to constitute an exercise of legislative authority properly belonging to Congress and the denial of due process that should be dispensed by judicial bodies. He calls for restoration of the principle that the affairs of government should be conducted "through and under law."

Williams called the book "rich" and cited in particular the reference to the excesses of

the Court of Chancery in England that ultimately called forth resistance. He referred to the regulation of steamer traffic in 1852, when inspection authority was placed with the Treasury Department, 35 years before the creation of the ICC.

Williams offered a somewhat more optimistic outlook than Hamburger did and mentioned recent cases in the 6th Circuit, cutting back on the deference given to an administrative agency and the 11th Circuit striking down an injunction imposed by the EPA as evidence the courts are pushing back against abuses of power by administrative agencies. As to whether reform can be achieved, he answered his own question by saying that it would require a change in the attitude of the public on the role of administrative agencies.

This writer would suggest that if reform requires a change in the public attitude, it will be difficult to achieve, because the agencies have had more than a century to entrench themselves behind walls of deference based on the idea that administrative agencies possess expertise that entitles them to independence from Congress and the courts.

Some agencies have done better than others have in protecting their prerogatives. The business community has enjoyed some success by prevailing on the D.C. Circuit to strike down rules issued by the Securities and Exchange Commission intended to enhance the ability of investors to raise issues through corporate proxies. Recent appointments to that court might block this avenue of attack and put the agencies back on top in this circuit, which decides the preponderance of appeals of agency rulings.